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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

12 ENTROPIC COMMUNICATIONS,
13 LLC,

14 Plaintiff,

15 v.

16 DISH NETWORK CORPORATION,
17 et al.,

18 Defendants.

19 DISH NETWORK CORPORATION;
20 DISH NETWORK L.L.C.; DISH
21 NETWORK SERVICE L.L.C.; DISH
22 NETWORK CALIFORNIA
SERVICE CORPORATION; AND
DISH TECHNOLOGIES, L.L.C.,

23 Counter-Claimants

24 v.

25 ENTROPIC COMMUNICATIONS,
26 LLC; MAXLINEAR, INC.; AND
MAXLINEAR COMMUNICATIONS
27 LLC,

28 Counter-Defendants.

Case No. 2:23-cv-1043-JWH-KES
(Lead Case)

**REDACTED VERSION OF
DOCUMENT PROPOSED TO BE
FILED UNDER SEAL**

**MAXLINEAR, INC. AND
MAXLINEAR COMMUNICATIONS
LLC'S NOTICE OF MOTION AND
MOTION TO DISMISS
(1) AMENDED COUNTERCLAIMS
BY DISH NETWORK CALIFORNIA
SERVICE CORPORATION; AND
(2) COUNTERCLAIMS BY DISH
NETWORK CORPORATION, DISH
NETWORK L.L.C., DISH
NETWORK SERVICE L.L.C., AND
DISH TECHNOLOGIES, L.L.C.**

*[Request for Judicial Notice
concurrently filed herewith]*

Judge: Hon. John W. Holcomb
Action Filed: Feb. 10, 2023
Am. Counterclaims and Counterclaims
Filed: Jan. 31, 2024

Hearing:

Date: March 29, 2024

Time: 9:00 a.m.

Place: Courtroom 9D, Santa Ana

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 29, 2024, at 9:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 9D of the United States District Court for the Central District of California, located at 411 W. 4th Street, Santa Ana, California, Counter-Defendants MaxLinear, Inc. and MaxLinear Communications LLC (collectively, “MaxLinear”) move to dismiss: (1) the Amended Counterclaims brought by Dish Network California Service Corporation ; and (2) Counterclaims brought by Dish Network Corporation, Dish Network L.L.C., Dish Network Service L.L.C., and DISH Technologies, L.L.C. (all entities collectively, “Dish”). As to the patent misuse claim, MaxLinear moves in the alternative, to strike it.

MaxLinear bases this motion on this notice; the attached memorandum of points and authorities; all pleadings, files, and records in this action; the request for judicial notice filed concurrently herewith and the accompanying declaration of Rose S. Lee; any reply memorandum; and other argument and evidence that the parties may present at the hearing on this motion. Under Local Rule 7-3, counsel conferred in advance of this motion on February 14, 2024.

Date: February 21, 2024

By: /s/ Bitra Rahebi
Bitra Rahebi

Attorney for Counter-Defendants
MAXLINEAR COMMUNICATIONS LLC
AND MAXLINEAR, INC.

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I. INTRODUCTION

For months, MaxLinear, Inc. and MaxLinear Communications LLC (collectively, “MaxLinear”) explained to Dish Network California Service Corporation (“Dish California”) that its Counterclaims suffered from fatal flaws, including lack of standing.

This time around, Dish California is joined by the three other Defendants, Dish Network Corporation, Dish Network L.L.C., and Dish Network Service L.L.C. (collectively, “Dish Affiliates”), as well as a new party, Dish Technologies L.L.C. (all entities collectively, “Dish”). But the addition of these parties and the attempt to mask the deficiencies through a combination pleading with vague references to “DISH” are of no help.¹

Dish’s eight counterclaims revolve around a core allegation—that MaxLinear acted with Entropic Communications, LLC (“Entropic”) to “launder the Asserted Patents, thus ‘washing’ them of the RAND encumbrances set forth in the MoCA IPR Policy.” (Am. Countercls. ¶ 124.) This conclusory allegation is implausible based on the record Dish itself submitted.

As a threshold matter, Dish still lacks standing to bring the counterclaims against MaxLinear. This alone warrants dismissal under Rule 12(b)(1).

Dish’s breach of contract claim (Count IV), in which it again omitted the contract, remains unviable. The Dish Affiliates are not intended beneficiaries and the EchoStar Promoter Agreement—on which Dish apparently relies—is clear on this. As for Dish Technologies, the purported former Alliance Party that Dish adds in an attempt to cure defects, Dish does not plead that EchoStar Technologies

¹ Rather than file two pleadings (Dish California’s Amended Counterclaims and the Dish Affiliates’ new Counterclaims), Dish merged its allegations into one, murky pleading. (ECF No. 316.) It also added a new party that was not contemplated by the Court’s Order. (See ECF No. 271.)

This Motion refers to the paragraphs of Dish’s pleading (ECF No. 316) before paragraph 507 of the “Answer” and the paragraphs thereafter as the “Am. Countercls.”

1 Corporation (the original signatory) (“EchoStar”) and Dish Technologies [REDACTED]
2 [REDACTED]. Dish also fails to
3 satisfy the performance requirement, as it does not claim that Dish Technologies
4 conveyed the required written request for a license. And as to the supposed breach,
5 ***Dish itself alleges that Entropic committed to licensing its patents that cover***
6 ***MoCA technology on reasonable and non-discriminatory terms.*** [REDACTED]

7 [REDACTED]
8 [REDACTED] (See ECF No. 316-8 at 258.)

9 Dish’s fraud and negligent misrepresentation (Count V) and conspiracy
10 (Count VI) claims fall far short of meeting Rule 9(b)’s heightened pleading
11 standard. Dish fails to specify who made what false statements and when, and
12 whether and how Dish relied on them. There can be no conspiracy between
13 MaxLinear and Entropic to “wash” patents of RAND obligations when Dish alleges
14 that Entropic committed to RAND licensing.

15 For quasi-contract/unjust enrichment (Count VII), Dish cannot as a matter of
16 law simultaneously allege that MaxLinear breached an enforceable contract and
17 raise a quasi-contract counterclaim denying an enforceable contract exists. Dish
18 also fails to plead any unjust benefit whatsoever that MaxLinear directly received
19 as a MoCA member from Dish.

20 Dish’s antitrust claims (Counts VIII and IX) fail, too. Again, Dish cannot
21 plausibly allege that MaxLinear conspired with Entropic to “wash” the patents
22 when Dish alleges that Entropic committed to licensing on RAND terms. Dish also
23 fails to allege any injury, let alone the requisite antitrust injury.

24 Patent misuse (Count X) is an affirmative defense, not an independent cause
25 of action. Finally, for Dish’s California Business & Professions Code, section
26 17200 (“UCL”) claim (Count XI), Dish pleads no new allegations beyond those in
27 its antitrust and patent misuse claims. Like those claims, this claim should be
28 dismissed.

1 In sum, Dish’s Counterclaims should be seen as what they are: a litigation
2 tactic to harass MaxLinear. If any Dish entity truly is a former MoCA Alliance
3 member, it should request to negotiate license terms, actually participate in such
4 discussions [REDACTED], and be done with these
5 wasteful collateral attacks. The Court should dismiss with prejudice all of Dish’s
6 claims against MaxLinear.

7 **II. SUMMARY OF THE FACTS**

8 **A. Entropic Communications, Inc. and MaxLinear**

9 MaxLinear, Inc. is a leading innovator of radiofrequency, analog, digital, and
10 mixed-signal semiconductor solutions. Its technological innovations allow people
11 to connect using faster, smarter, and more efficient communications networks. In
12 2015, MaxLinear acquired Entropic Communications, Inc.—a different entity than
13 plaintiff, Entropic Communications, LLC. (ECF No. 1 (“Compl.”) ¶ 21.)
14 MaxLinear sold a portfolio of patents to plaintiff, Entropic Communications, LLC,
15 in 2021. (*See id.* ¶ 22.)

16 **B. MoCA and the IPR Policy**

17 MoCA is a non-profit corporation. (*See* IPR Policy² § 1.) It is a standard-
18 setting organization formed to “develop[] and promot[e] specifications for the
19 transport of digital entertainment and information content over in-home coaxial
20 environments.” (*Id.*) Entropic Communications, Inc. and EchoStar were founding
21 members of MoCA. (*See* Am. Countercls. ¶ 23.)

22 Dish did not attach the EchoStar Promoter Agreement³ from which it claims
23 rights. That Promoter Agreement governs the relationship between MoCA and the
24 Alliance Party, which Dish now alleges is EchoStar’s successor-in-interest, Dish

25 ² When MaxLinear refers to MoCA’s Intellectual Property Rights (“IPR”) Policy, it
26 refers to the current version as revised on October 31, 2017. (Request for Judicial
27 Notice (“RJN”), Ex. A (“IPR Policy”).) MaxLinear’s arguments also apply to the
2011 Policy unless otherwise stated.

28 ³ MaxLinear seeks judicial notice of the EchoStar Promoter Agreement. (RJN
Ex. B (“Promoter Agreement”).)

1 Technologies. In it, the Alliance Party agrees [REDACTED]
2 [REDACTED] (Promoter Agreement § 4.1.)

3 The IPR Policy imposes upon MoCA’s members—known as Alliance
4 Parties—and their affiliates a limited obligation to license “Essential Patent
5 Claims.” (IPR Policy §§ 2, 5.1.1.) Essential Patent Claims are claims that (1) are
6 necessarily infringed by complying with technical specifications of an approved
7 MoCA standard, and (2) lack commercially reasonable non-infringing alternatives.
8 (*Id.* § 2.)

9 An Alliance Party need only “offer and attempt to negotiate” a license to
10 Essential Patent Claims “upon the written request” of another Alliance Party. (*Id.*
11 § 5.1.1.) Importantly, an Alliance Party and *its* “Affiliates” owe this limited
12 licensing obligation only to other Alliance Parties, *not* their affiliates. (*Id.* §§ 2,
13 5.1.1.) [REDACTED]

14 [REDACTED] (Promoter
15 Agreement §§ 3.2, 6.)

16 If an Alliance Party leaves MoCA, its entitlement to request an offer for a
17 license is restricted. A former Alliance Party may only request a license for “Fully
18 Compliant Products” that conform with Draft Deliverables or Approved Draft
19 Deliverables approved *before* it terminated its membership. (IPR Policy § 7.1.)

20 C. Entropic Sues Dish for Infringement

21 Prior to filing its complaint, Entropic stated to Dish that, “*Entropic [is]*
22 *committed ‘to licensing its patents that cover MoCA technology on reasonable*
23 *terms, without discrimination among similarly-situated providers (often called*
24 *‘RAND terms’).*” (Am. Countercls. ¶ 52 (emphasis added); ECF No. 316-8 at
25 258.) [REDACTED] (ECF No. 316-8 at
26 258.) In February 2023, Entropic initiated suit.

27 D. Dish Sues MaxLinear

28 Dish California filed its Counterclaims in September 2023, in which it

1 asserted four counterclaims against MaxLinear. (ECF No. 111, Counts III–VI.) On
2 December 22, 2023, MaxLinear moved to dismiss. (ECF No. 246.) MaxLinear
3 pointed out deficiencies with the pleading, including lack of standing and omitting
4 Dish’s MoCA Agreement. (*Id.*) After MaxLinear filed its motion, Dish California
5 backtracked on its proposed briefing schedule and eventually filed the governing
6 pleading on January 31. (ECF No. 316.)

7 **III. LEGAL STANDARD**

8 **A. Rule 12(b)(1)**

9 Rule 12(b)(1) allows the dismissal of a counterclaim for lack of subject-
10 matter jurisdiction, which includes standing. *See Chandler v. State Farm Mut.*
11 *Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). “The Article III case or
12 controversy requirement limits federal courts’ subject matter jurisdiction by
13 requiring, inter alia, that plaintiffs have standing and that claims be ‘ripe’ for
14 adjudication.” *Id.* at 1121. A court must dismiss an action where the party fails to
15 show injury-in-fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*,
16 504 U.S. 555, 560-61 (1992). “Because standing and ripeness pertain to federal
17 courts’ subject matter jurisdiction, they are properly raised in a Rule 12(b)(1)
18 motion to dismiss.” *Chandler*, 598 F.3d at 1122.

19 As the party invoking the federal court’s jurisdiction, Dish “bears the
20 burden” of alleging specific facts sufficient to prove its Article III standing. *Id.*; *see*
21 *also Lujan*, 504 U.S. at 560-61. Dish must do so for “each claim” and “each form
22 or relief” that it seeks. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 352
23 (2006) (internal quotations and citations omitted).

24 **B. Rule 12(b)(6)**

25 Under Rule 12(b)(6), “a complaint must contain sufficient factual matter,
26 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
27 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
28 570 (2007)). Dismissal is proper “where there is no cognizable legal theory or an

1 absence of sufficient facts alleged to support a cognizable legal theory.” *L.A.*
2 *Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017) (internal quotation
3 and citation omitted).

4 A “claim has facial plausibility when the plaintiff pleads factual content that
5 allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
7 Although it must accept as true all factual allegations in a complaint, a court need
8 not do so for “allegations that contradict matters properly subject to judicial notice
9 or by exhibit” or “are merely conclusory, unwarranted deductions of fact, or
10 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988,
11 *amended*, 275 F.3d 1187 (9th Cir. 2001). “Threadbare recitals of the elements of a
12 cause of action, supported by mere conclusory statements, do not suffice” to avoid
13 dismissal. *Iqbal*, 556 U.S. at 678.

14 C. Rule 12(f)

15 Rule 12(f) permits a party to move the court to “strike from a pleading . . .
16 any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P.
17 12(f). The function of a 12(f) motion to strike “is to avoid the expenditure of time
18 and money that must arise from litigating spurious issues by dispensing with those
19 issues prior to trial.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993),
20 *rev’d on other grounds*, 510 U.S. 517 (1994) (internal quotation and citation
21 omitted).

22 IV. ARGUMENT

23 A. The Court Should Dismiss the Pleading for Lack of Standing 24 Under Rule 12(b)(1)

25 Dish’s Amended Counterclaims lack any plausible injury-in-fact that can be
26 redressed by favorable decision. The “irreducible constitutional minimum of
27 standing” requires an injury-in-fact. *Lujan*, 504 U.S. at 560. A plaintiff has the
28 burden of showing that it “suffered . . . an invasion of a legally protected interest

1 that is concrete and particularized . . . and ‘actual or imminent, not “conjectural” or
2 “hypothetical.”’” *Id.* (citation omitted). Moreover, it must be “‘likely” that “the
3 injury will be ‘redressed by a favorable decision.’” *Id.* at 561 (citation omitted).

4 **1. Dish Affiliates are not intended beneficiaries, and Dish's**
5 **allegations are insufficient as to Dish Technologies**

6 Dish’s pleading suffers from incurable standing deficiencies. The Dish
7 Affiliates do not have rights or beneficiary status to enforce the IPR Policy. (*See*
8 *Am. Countercls.* ¶¶ 64-74.) As a matter of law, “the terms of the contract must
9 demonstrate the *express* intent to confer [that] benefit” on the Dish Affiliates for
10 them to claim the mantle of a third-party beneficiary. *Sherman v. Pepperidge*
11 *Farm, Inc.*, 2023 WL 5207458, at *4 (C.D. Cal. Apr. 28, 2023) (Holcomb, J.)
12 (emphasis modified; internal quotation and citation omitted). The IPR Policy
13 explicitly demonstrates the opposite—there is an intent *not* to confer third-party
14 beneficiary status on affiliates or any non-members of MoCA.

15 The EchoStar Promoter Agreement expressly provides [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 Dish admits that the Dish
28 Affiliates did not execute the documents required to become an independent MoCA

1 member. (Am. Countercls. ¶ 73.) [REDACTED]
2 [REDACTED] (Promoter Agreement
3 § 4.6.) This is fatal.

4 Dish attempts to salvage its claim by arguing that the Dish Affiliates
5 somehow obtained “*de facto*” member status because certain board minutes referred
6 to “DISH.” (Am. Countercls. ¶ 73.) MoCA guarded against precisely such
7 arguments. The IPR Policy § 5.3 states, “[N]o license, immunity or other right is
8 granted under this IPR Policy by any Alliance Party or its Affiliates to any other
9 Alliance Parties or their Affiliate . . . other than the agreements to grant licenses
10 expressly set forth herein.” *See Stockton Exec. Limousine Charter Serv., Inc. v.*
11 *Union Pac. R.R.*, 2006 WL 769623, at *6 (E.D. Cal. Mar. 27, 2006) (“California
12 law establishes that the parties’ course of conduct . . . ‘can only be applied when the
13 contract is ambiguous, and cannot be used when the contract is unambiguous.’”) (citation omitted).

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]⁴ [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 Faced with this explicit contractual language, Dish pivots and argues that
21 RAND licenses **must** be extended to non-members of a standard-setting
22 organization (“SSO”). (*See* Am. Countercls. ¶¶ 65-66.) This is not the law nor
23 what EchoStar, a founding member of MoCA, explicitly agreed to. (*See id.* ¶ 23.)
24 It is the language of the SSO’s contract that controls. In Dish’s cited cases, the
25 SSO policies expressly granted broad rights to third parties. *See HTC v. Ericsson*,

26
27 ⁴ Precision is important here. Just in December, Dish identified a different entity—
28 DISH Network Corporation—which it now concedes is a mere Affiliate. (ECF No. 252-4 at 1-2; Am. Countercls. ¶ 72.)

1 12 F.4th 476, 481 (5th Cir. 2021) (Ericsson “agreed with ETSI to grant licenses to
2 other companies” on RAND terms); *Ericsson v. D-Link*, 773 F.3d 1201, 1209 (Fed.
3 Cir. 2014) (SSO requiring members to “grant a license under reasonable rates to an
4 unrestricted number of applicants on a worldwide basis”); *Microsoft v. Motorola*,
5 795 F.3d 1024, 1031-33 (9th Cir. 2015) (Motorola committed to ITU and IEEE to
6 negotiate licenses worldwide on RAND terms). But, as the court in *Microsoft* also
7 acknowledged, not all SSOs require participants to offer RAND licenses to third
8 parties. 795 F.3d at 1031. That is exactly the case here where the IPR Policy and
9 Promoter Agreement clearly limit who is entitled to rights under the policy and
10 rejects any obligation to license affiliates.

11 **2. Dish does not plead it made a compliant request for a**
12 **license**

13 Dish again fails to plead that it made a proper request for a license offer
14 under the IPR Policy. Only a MoCA Alliance Party (or former Alliance Party) can
15 request a license offer, which must be in writing. (*See* IPR Policy § 5.1.1.) Dish
16 only alleges that Dish Network L.L.C., which is not an Alliance Party, submitted
17 written requests for a license offer. (Am. Countercls. ¶¶ 54, 55; *see also* RJN
18 Ex. C.) Dish does not allege that Dish Technologies, the only Dish entity that it
19 claims was a member of MoCA, ever made a written request under IPR Policy
20 Section 5.1.1.

21 Moreover, the obligation to offer a RAND License under Section 5.1.1 to a
22 former member only extends to standards that were approved by the MoCA Board
23 while the former member was still a MoCA member. (IPR Policy § 7.1.)
24 Consequently, Dish needed, but failed, to plead which MoCA standards are at issue.
25 (*See id.* §§ 5.1.1, 7.1; Am. Countercls. ¶ 54; RJN Ex. C.) Nothing in the IPR Policy
26 protects an Alliance Party member—current or former—from a lawsuit when it
27 neglects to request a license before infringing essential patents. Quite the contrary;
28 the IPR policy expressly permits lawsuits for damages. (IPR Policy § 5.1.1.)

1 Further, the IPR Policy only requires the parties to “offer and attempt to
2 negotiate a license” for essential patent claims. (*Id.*) Dish never pleads that
3 Entropic refused to negotiate a RAND license in good faith or that Entropic flatly
4 denied it a RAND license. [REDACTED]

5 [REDACTED] (See ECF No. 316-8 at 258.)

6 Because Dish did not, and could not, remedy this defect, the Court should
7 dismiss with prejudice for lack of standing.

8 **3. Dish does not identify a concrete and particular injury**
9 **capable of redress**

10 Dish claims that it has suffered actionable harm because it is required to
11 shoulder costs in defense of the underlying litigation and suffered vague
12 reputational harm in the marketplace. (See Am. Countercls. ¶¶ 110, 122, 131, 147,
13 155, 159, 163.) Yet Dish offers no facts about any concrete or particularized harm
14 to its reputation. Moreover, “[l]itigation costs are insufficient to establish standing
15 for purposes of Article III.” *San Diego Unified Port Dist. v. Monsanto Co.*, 309 F.
16 Supp. 3d 854, 866 (S.D. Cal. 2018) (costs in defending litigation that “would not
17 have been initiated” absent counter-defendant’s action do not provide standing).
18 And because Dish Technologies is not a party to the underlying suit, it could not
19 have suffered any litigation costs or reputational harm.

20 Dish additionally lacks standing to enforce the IPR Policy’s assignment
21 language provision, as it has not suffered any redressable injury caused by
22 MaxLinear. The IPR Policy provides that RAND obligations attach to Essential
23 Patent Claims, even if the assignment is silent on the obligations. (IPR Policy
24 § 5.1.2 (“[T]he licensing obligations under this IPR Policy are intended to be
25 binding (e.g., as encumbrances) on all successors-in-interest regardless of whether
26 such provisions are included.”).)⁵ Dish’s pleading also concludes that the

27 _____
28 ⁵ This language is in the governing 2017 IPR Policy, which expressly supersedes
earlier drafts.

obligations of the IPR Policy are binding on any successors-in-interest. (*See* Am. Countercls. ¶¶ 33, 34, 103.) This moots Dish’s case against MaxLinear because RAND obligations attach to Essential Patent Claims no matter what.

Notably, Dish will not represent that its products fully comply with MoCA. RAND obligations only apply to requests for licenses for products that *fully comply* with a relevant MoCA standard. (IPR Policy §§ 5.1.1 (license limited to Fully Compliant Products), 7.1; Am. Countercls. ¶ 61 (quoting IPR Policy § 7.1).) For all but one of the patents, Dish claims to not know whether its products are compliant with MoCA standards asserted in the underlying litigation. (Am. Answer ¶¶ 84, 118, 152, 220, 288, 322, 356, 424, 458.) For one patent, Dish denies its products comply with MoCA standards. (Am. Answer ¶ 186; *see also* Am. Countercls. ¶ 39 (“For the avoidance of doubt, DISH does not accept Entropic’s contention that the Asserted Claims in this action are necessary to products that implement any MoCA standard.”).)

Because Dish has not articulated a “concrete” and “particularized” injury, the Court should dismiss its claims for lack of standing. *Lujan*, 504 U.S. at 560.

B. Count IV: Dish Fails to Plead a Breach of Contract Claim

A cause of action for breach of contract requires the following: “(1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach.” *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008).

1. Dish Does Not Plead the Contract Terms

Dish does not present the Court with the governing agreement from which Dish Technologies claims a right to sue: the EchoStar Promoter Agreement. And the only IPR Policy it submits is a 2011 version that was superseded in 2017. (ECF No. 307-3; *see* IPR Policy § 1 (“This IPR Policy supersedes any and all prior documentation regarding the Intellectual Property of the Alliance”); Promoter Agreement § 6 ([REDACTED]).)

1 As MaxLinear has repeatedly explained, the contract “terms must be set out
2 verbatim in the body of the complaint, or a copy of the written contract must be
3 attached to the complaint or incorporated by reference.” *Roman v. Vericrest Fin.,*
4 *Inc.*, 2013 WL 12142960, at *2 (C.D. Cal. Dec. 3, 2013).

5 Another problem is that Dish seeks relief based on the outdated 2011 IPR
6 Policy. Dish is unable to enforce any alleged breaches under this superseded
7 policy. *See Rack Safety Prod., LLC v. Double Backstop, Inc.*, 2023 WL 3432250,
8 at *5 (C.D. Cal. Mar. 9, 2023) (“[B]ecause the 2016 Agreement superseded the
9 2015 Agreement, the Court concludes that Rack Safety cannot state a claim for
10 breach of the 2015 Agreement based on Defendants’ conduct after 2016.”). And as
11 a practical matter, it would be pointless. Even under the superseded 2011 IPR
12 Policy, Dish’s counterclaims fail.⁶ No version of the IPR Policy can render any of
13 Dish’s claims plausible where Entropic has already committed to licensing its
14 MoCA patents on RAND terms.

15 MaxLinear should not be forced to endure this perpetual game of whac-a-
16 mole, notwithstanding Dish’s claimed reservation. (*See* Am. Countercls. ¶¶ 26
17 n.10, 29 n.11.)

18 **2. Dish failed to plead privity of contract or that the entities**
19 **are intended beneficiaries**

20 Only parties to a contract “have rights or liabilities under the contract.”
21 *McCormick v. US Bank, N.A.*, 2012 WL 12869274, at *4 (S.D. Cal. Oct. 30, 2012).
22 A “cause of action for breach of contract requires privity of contract between the
23 plaintiff and the defendant.” *Simoni v. Am. Media, Inc.*, 2014 WL 12597640, at *3
24 (C.D. Cal. July 22, 2014), *aff’d*, 673 F. App’x 782 (9th Cir. 2017). One exception

25 _____
26 ⁶ The two IPR Policies are similar, but do differ in a few respects. The 2017 IPR
27 Policy expressly states that the licensing obligations are intended to be binding on
28 successors in interest, regardless of whether such a provision is included in the
transfer document. (§ 5.1.2.) It also makes clear that upon a proper written request,
the onus on the Alliance Party is only to attempt to negotiate a license with the
Requesting Alliance Party. (*Id.* § 5.1.1.)

1 pertains to third-party beneficiaries. *See Transamerica Life Ins. Co. v. Ponso*, 2020
2 WL 6875181, at *3 (C.D. Cal. Nov. 18, 2020). “[A] contract must be made
3 expressly for the benefit of a third party for that party to enforce the contract as a
4 third-party beneficiary.” *Nat’l Rural Telecomms. Co-op. v. DIRECTV, Inc.*, 319 F.
5 Supp. 2d 1094, 1100 (C.D. Cal. 2003); *see also Sherman*, 2023 WL 5207458, at *4.

6 The Dish Affiliates were never members of MoCA, and the express terms of
7 the Promoter Agreement and IPR Policy *deny* affiliates rights. [REDACTED]

8 [REDACTED]
9 [REDACTED] (See Promoter Agreement § 9.13.)

10 **3. Dish did not adequately allege performance**

11 “It is elementary a plaintiff suing for breach of contract must prove it has
12 performed all conditions on its part or that it was excused from performance.”
13 *Consol. World Invs., Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992).

14 Dish, in one conclusory paragraph, states that, “[t]o the extent the MoCA IPR
15 Policy imposes any obligations on DISH, DISH has discharged them.” (Am.
16 Countercls. ¶ 107.) Dish obfuscates who made the request (“DISH made a request,
17 in writing for a RAND-compliant license offer”)—and fails to allege it was a
18 former Alliance member. (*Id.*) Only a MoCA Alliance Member—and no Dish
19 Affiliate—has the right to request a license under the IPR Policy.

20 **4. Dish fails to allege any breach by MaxLinear**

21 Dish asserts that MaxLinear breached two provisions of the IPR Policy:
22 (1) Section 5.1.2 by allegedly failing to transfer the Asserted Patents “subject to the
23 terms” of the IPR Policy; and (2) Section 4.1.2 by allegedly “attempting to
24 intentionally circumvent the RAND promise” when it transferred the patents to
25 Entropic. (Am. Countercls. ¶¶ 108-09.) Both claims are implausible.

26 First, MaxLinear transferred the patents to Entropic pursuant to its
27 obligations. Section 5.7 of the transfer agreement states, [REDACTED]

28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] (ECF No. 316-7 (Patent Purchase Agreement
5 (“PPA”)) § 5.7 (emphasis added).) [REDACTED]
6 [REDACTED] (*Id.* Ex. I.) Second, any alleged breach is rendered implausible by
7 Entropic’s written commitment to license on RAND terms. (See Am. Countercls. ¶
8 52.) Thus, there can be no circumvention, intentional or otherwise.

9 There is no breach. [REDACTED]
10 [REDACTED] (See ECF No. 316-8 at
11 258.) And certainly, nothing in any agreement required MaxLinear to ensure Dish
12 would [REDACTED]
13 [REDACTED] (*Id.*)

14 **C. Count V: Dish Again Fails to Meet the Pleading Standard for**
15 **Fraud or Negligent Misrepresentation**

16 Dish not only fails to meet Rule 9(b)’s heightened pleading standard, but it
17 also does not meet the *Twombly/Iqbal* threshold of plausibility. Dish bases its
18 claim on MaxLinear’s representation “that it would license the Asserted Patents
19 under RAND terms and conditions and ensure any future owners of the Asserted
20 Patents would be obligated to offer licenses under RAND terms and conditions.”
21 (Am. Countercls. ¶ 112.) But this allegation is belied by Dish’s own pleading.

22 First, Dish never alleges that *MaxLinear* refused to offer Dish a license to
23 essential patents on RAND terms. Second, Entropic’s express commitment to
24 license the Asserted Patents on RAND terms directly contradicts the vague and
25 conclusory allegations stating otherwise. (See *id.* ¶ 52.) [REDACTED]
26 [REDACTED]

27 (PPA § 5.7, Ex. I.) And Entropic has never disputed that essential patents are
28 subject to MoCA’s licensing policy.

1 Also, because Dish asserts no facts that any of MaxLinear’s representations
2 were false at the time they were made, Dish’s claim is facially implausible and
3 should be dismissed. *See Iqbal*, 556 U.S. at 678 (“A claim has facial plausibility
4 when the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.”).

6 Dish further fails to specify the circumstances constituting the alleged fraud
7 or negligent misrepresentation with particularity. *See Hurd v. Boston Sci. Corp.*,
8 2023 WL 3564741, at *3 (C.D. Cal. Apr. 10, 2023) (“In the Ninth Circuit, claims
9 for fraud and negligent misrepresentation must meet Rule 9(b)’s particularity
10 requirements.”) (Holcomb, J.) (internal quotation and citation omitted). Satisfying
11 that requirement means, at the minimum, identifying (1) what specifically was
12 misrepresented, (2) who made the representation, (3) why the representation is
13 false, and (4) when the representation occurred. *See Schreiber Distribut. Co. v.*
14 *Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (“[T]he pleader
15 must state the time, place, and specific content of the false representations as well
16 as the identities of the parties to the misrepresentation.”).

17 Dish vaguely alleges “[o]n information and belief” that MaxLinear made
18 false representations, but does not state when or by whom. (*See* Am. Countercls.
19 ¶ 112.) That conclusory statement is inadequate. *Gabor v. Cnty. Of Santa Clara*
20 *Bd. Of Supervisors*, 2008 WL 902407, at *4 (N.D. Cal. Mar. 31, 2008)
21 (“Allegations that are vague or conclusory are insufficient to satisfy the
22 ‘particularity’ required by Rule 9(b).”).

23 Dish also fails to plead any facts to support the conclusory allegation that
24 MaxLinear’s representations “were false at the time MaxLinear made them.” (Am.
25 Countercls. ¶ 113.) *See Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152 (S.D.
26 Cal. 2001) (“[T]he plaintiff must plead facts explaining why [a] statement was false
27 when it was made.”). Alleged acts or omissions that Entropic performed in the
28 **present** cannot show that a **past** MaxLinear statement was false. *See Dotson v.*

1 *Europharma, Inc.*, 2021 WL 4826611, at *6 (C.D. Cal. May 27, 2021) (A plaintiff
2 cannot “simply point[] to a defendant’s statement, not[e] that the statement conflicts
3 with the current state of affairs, and then conclud[e] that the statement in question
4 was false when made.”) (internal quotation and citation omitted).

5 Dish further fails to properly plead reliance and causation. A plaintiff is
6 required “to allege specific facts not only showing [it] actually and justifiably relied
7 on the defendant’s misrepresentations, but also how the actions [it] took in reliance
8 on the defendant’s misrepresentations caused the alleged damages.” *Tabletop
9 Media, LLC v. Citizen Sys. Of Am. Corp.*, 2017 WL 10591885, at *5 (C.D. Cal.
10 Mar. 3, 2017) (internal quotation and citation omitted). Dish vaguely claims that it
11 relied on representations that MoCA participants “would honor their commitments
12 under the MoCA IPR Policy when deciding what technologies to utilize in its
13 business,” but fails to specify who made the statements and when. (*See Am.
14 Countercls.* ¶ 120.) And Dish does not plead it relied on these representations to
15 make any decisions or that it would have utilized other technologies but-for these
16 representations. (*See id.* ¶ 121 (“[A]bsent a representation to license on RAND
17 terms, DISH *may* have elected to use different technology.”) (emphasis added).) In
18 fact, it either denies using the inventions or does not know if it has used the
19 inventions. (*See Am. Ans* ¶¶ 84, 118, 152, 186, 220, 288, 322, 356, 424, 458.)

20 **D. Count VI: Dish Again Fails to Plead a Proper Conspiracy Claim**

21 Dish attempts to restyle its conspiracy claim, but it again hinges on its claim
22 for fraud and negligent misrepresentation (Count V). (*See Am. Countercls.* ¶ 124
23 (accusing Entropic and MaxLinear of “conspir[ing] to commit fraud and negligent
24 misrepresentation to avoid having to license the Asserted Patents on RAND terms
25 in violation of the MoCA IPR Policy.”).)

26 As noted above, the Court should dismiss Count V for failure to state a claim.
27 *See Part IV.C.* That failure, in turn, warrants dismissal of Count VI. *See Mintel
28 Learning Tech., Inc. v. Beijing Kaidi Educ.*, 2007 WL 2288329, at *4 (N.D. Cal.

1 Aug. 9, 2007) (“If the plaintiff fails to adequately plead the underlying claim, the
2 corresponding conspiracy claim must also fail.”).

3 Further, Dish has not adequately pleaded the elements of a civil conspiracy.
4 Those elements include “(1) the formation and operation of a conspiracy,
5 (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising
6 from the wrongful conduct.” *Id.*; see also *Allied Equip. Corp. v. Litton Saudi*
7 *Arabia Ltd.*, 7 Cal.4th 503, 511 (1994) (“A civil conspiracy, however atrocious,
8 [also] does not per se give rise to a cause of action unless a civil wrong has been
9 committed resulting in damage.”) (internal quotation and citation omitted).

10 There is no conspiracy as the transfer agreement [REDACTED]
11 [REDACTED] (PPA, Ex. I.) And there is
12 no wrongful conduct—or damage—where Entropic has complied with the RAND
13 obligations, even going so far as to acknowledge its commitment to RAND
14 licensing before receiving an IPR Policy-compliant request from Dish
15 Technologies. (Am. Countercls. ¶ 52; RJN Ex. D.)

16 **E. Count VII: Dish Fails to Plead Quasi-Contract for Restitution /**
17 **Unjust Enrichment**

18 Dish’s quasi-contract claim should be dismissed.⁷ (See Am. Countercls.
19 ¶¶ 133-137.)

20 First, “[a]s a matter of law, a quasi-contract action for unjust enrichment does
21 not lie where, as here, express binding agreements exist and define the parties’
22 right.” *Cal. Med. Ass’n Inc. v. Aetna U.S. Healthcare of Cal. Inc.*, 94 Cal. App. 4th
23 151, 172 (2001). Because Dish does not dispute the validity of the applicable
24 MoCA agreement, it cannot raise a quasi-contract claim. See *Klein v. Chevron*
25 *U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1389-90 (2012) (although plaintiff may plead
26 inconsistent claims, it may not plead a claim for quasi-contract without denying

27 _____
28 ⁷ Unjust enrichment is not a cause of action. *McVicar v. Goodman Glob., Inc.*, 1 F.
Supp. 3d 1044, 1059 (C.D. Cal. 2014).

1 existence of enforceable contract).

2 Second, allegations that MaxLinear benefited from MoCA, or that MoCA
3 and MaxLinear benefited from Dish’s “considerable expenditures,” do not entitle
4 Dish to relief. MaxLinear was a MoCA member, so any benefit received was not
5 unjust. “[T]he person receiving the [alleged] benefit is required to make restitution
6 only if the circumstances are such that, as between the two individuals, it is unjust
7 for the person to retain it.” *Copley v. Natera, Inc.*, 2023 WL 3772023, at *5 (N.D.
8 Cal. May 8, 2023) (internal quotation and citation omitted).

9 Third, to state this counterclaim, Dish must allege MaxLinear “has been
10 unjustly conferred a benefit through mistake, fraud, coercion, or request.” *Pargett*
11 *v. Wal-Mart Stores, Inc.*, 2020 WL 5028317, at *6 (C.D. Cal. Apr. 10, 2020)
12 (internal quotation and citation omitted). Dish says MaxLinear made
13 misrepresentations, including “misrepresenting to the public it would license
14 essential patents on RAND terms.” (See Am. Countercls. ¶ 137.) Dish falls well
15 short of Rule 9(b)’s heightened standard. Again, Dish never asserts which
16 particular statements were false, how they were false (especially when Entropic
17 committed to offering a license on RAND terms), or when they were made. See
18 *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). Dish
19 further claims that MaxLinear and the other MoCA members’ representations
20 induced Dish to adopt MoCA standards. (See Am. Countercls. ¶ 136.) But in this
21 allegation, Dish suddenly forgets that one of its affiliates was a *founding member*
22 of MoCA—long before MaxLinear was even a member.

23 **F. Count VIII: Dish’s Combination in Restraint of Trade Claim Is**
24 **Facially Implausible and Fails to State a Claim**

25 Dish’s antitrust claim is based on the same allegation that MaxLinear entered
26 into an unlawful agreement with Entropic to “wash” the Asserted Patents of any
27 RAND obligation. (*Id.* ¶¶ 144-45.) That claim is facially implausible and does not
28 satisfy the elements of a Sherman Act claim, because Dish simultaneously alleges

1 that Entropic’s CEO committed to licensing the patents on RAND terms.
2 (*Compare id.* ¶ 145 (“a purpose of the Patent Purchase Agreement was to avoid a
3 RAND obligation”) *with id.* ¶ 52, RJN Ex. D at 78 (Entropic CEO committed “to
4 licensing its patents that cover MoCA technology on reasonable terms, without
5 discrimination among similarly-situated providers (often called ‘RAND terms’)).”) The entire predicate for Dish’s Sherman Act Section 1 claim is implausible and
6 requires dismissal under *Iqbal/Twombly*.
7

8 Dish’s antitrust claims also fail because it does not allege that MaxLinear and
9 Entropic entered into an agreement that unreasonably restrained **competition** in any
10 relevant market or acted in concert to do so. *See Am. Ad Mgmt. v. GTE Corp.*, 92
11 F.3d 781, 788 (9th Cir. 1996). The alleged attempt to “wash” the Asserted Patents
12 could not have restrained competition because, among other things, it was a legal
13 impossibility. The licensing obligations under the IPR Policy are binding on all
14 transferees. (*See IPR Policy* § 5.1.2.)

15 Dish cites *HTC Corp. v. IPCom GmbH & Co.* in an attempt to save its
16 antitrust claim from this fatal flaw. (*See Am. Countercls.* ¶ 145.) But *HTC*
17 provides no such lifeline. The language from *HTC* that Dish quotes is party
18 argument. ***It was not the holding of the court.*** To the contrary, the court held that,
19 “deceit merely enabling a monopolist to charge higher prices that it otherwise could
20 have charged—would not in itself constitute monopolization.” 2010 WL
21 11719073, at *6 (D.D.C. Nov. 5, 2020) (quoting, *Rambus Inc. v. FTC*, 522 F.3d
22 456, 459 (D.C. Cir. 2008)).

23 Dish also failed to plead that it suffered any antitrust injury, a necessary
24 element of an antitrust claim. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S.
25 328, 334 (1990). Antitrust injury flows from that which makes the conduct
26 unlawful and is of the type that antitrust laws were meant to prevent. *Somers v.*
27 *Apple*, 729 F.3d 953, 963 (9th Cir 2019). Here, Dish claims two types of injuries:
28 (1) litigation costs and (2) payment of patent damages. Neither qualifies.

Under the *Noerr-Pennington* doctrine, prosecuting a lawsuit is immune from antitrust liability absent sham litigation. *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). And, patent enforcement litigation is presumptively in good faith and does not harm competition. *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979); *see also Vizio, Inc. v. Funai Electric Co. Ltd.*, 2010 WL 7762624, at *5 (C.D. Cal. Feb. 3, 2010). The payment of appropriate patent damages imposed by this Court also cannot constitute antitrust injury. *See Rambus*, 522 F.3d at 459. In any event, if the IPR Policy does apply, the Court will impose damages at a RAND rate, where appropriate. Dish will not suffer antitrust injury.

G. Count IX: Dish’s Cartwright Act Claim Fails for the Same Reasons as Its Sherman Act Claim

The Cartwright Act operates in functionally the same way to the Sherman Act. *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (“The analysis under California’s antitrust law mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act.”); *Stewart v. Gogo, Inc.*, 2013 WL 1501484, at *5 (N.D. Cal. Apr. 10, 2013) (dismissing Cartwright Act claim where Sherman Act claim inadequately plead).

This claim fails for the same reasons as the Combination in Restraint of Trade claim. *See Cal. Pharm. Mgmt., LLC v. Zenith Ins. Co.*, 2010 WL 11519328, at *7-8 (C.D. Cal. Dec. 1, 2010) (dismissing both Sherman and Cartwright Act claims with prejudice).

H. Count X: Patent Misuse Is Not an Independent Cause of Action

Patent misuse is not a claim. “[T]he defense of patent misuse may not be converted to an affirmative claim for damages simply by restyling it as a declaratory judgment counterclaim.” *B. Braun Med., Inc. v. Abbott Lab’ys*, 124 F.3d 1419, 1428 (Fed. Cir. 1997).

1 And when an accused infringer seeks an unenforceability determination, as
2 Dish does, the counterclaim serves no purpose as it is duplicative of the affirmative
3 defense. (Am. Ans. ¶ 505.) *See Stickrath v. Globalstar, Inc.*, 2008 WL 2050990, at
4 *5 (N.D. Cal. May 13, 2008) (striking counterclaim where there was a “complete
5 identity of factual and legal issues” between affirmative defense and counterclaim,
6 and the latter served no “useful purpose”). The Court should therefore dismiss, or
7 in the alternative, strike, the patent misuse claim.

8 **I. Count XI: Dish Does Not Plead a UCL Claim**

9 Dish pleads no new allegations in its UCL claim that are not present in its
10 Sherman Act, Cartwright Act, or patent misuse counterclaims. (*See* Am.
11 Countercls. ¶ 162.) It therefore should be dismissed with prejudice. *See Hicks v.*
12 *PGA Tour, Inc.*, 897 F.3d 1109, 1123-24 (9th Cir. 2018) (affirming dismissal of
13 § 17200 claim where the Court also dismissed antitrust claims for failure to plead a
14 relevant market); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375
15 (2001) (affirming dismissal of UCL claim when antitrust claim dismissed and “the
16 same conduct is alleged to be both an antitrust violation and an ‘unfair’ business act
17 or practice for the same reason”).

18 **J. Leave to Amend Would Be Futile**

19 The Court should deny leave to amend. Courts consider five factors in
20 allowing leave: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party,
21 (4) the futility of amendment, and (5) whether the plaintiff has previously amended
22 his or her complaint. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004).
23 “Futility alone can justify the denial of a motion for leave to amend.” *Id.*

24 These factors all weigh against amendment. Dish California initiated
25 counterclaims against MaxLinear when it had no standing; it then delayed motion
26 practice in the hopes of keeping its lawsuit alive. But even with the benefit of extra
27 time to amend and the untimely addition of non-Defendant Dish Technologies, all
28 of Dish’s counterclaims still fail. Indeed, the addition of Dish Technologies

1 confirms that Dish California should never have initiated suit against MaxLinear.

2 MaxLinear has been prejudiced. Dish has known about the deficiencies for
3 months. It refused to amend until MaxLinear expended resources to file a motion
4 to dismiss, and it still has not attached the applicable agreement.

5 Most importantly, further amendment is futile. The core allegation at the
6 heart of the counterclaims is that Dish somehow was deprived of RAND license
7 rights, but Entropic committed to licensing on RAND terms by Dish's own
8 allegations. This admission is fatal to all of Dish's counterclaims. And a spat
9 regarding [REDACTED] should not have
10 led to this litigation.

11 **V. CONCLUSION**

12 Dish has not been able to address the fatal defects in its case and has instead
13 introduced more implausible claims with yet more incurable defects. The Court
14 should dismiss the counterclaims with prejudice.

1 Dated: February 21, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Counter-Defendants MAXLINEAR, INC. and MAXLINEAR COMMUNICATIONS LLC, certifies that this brief contains 6938 words, which complies with the word limit of L.R. 11-6.1.

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